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In The

Supreme Court of The United States

OCTOBER TERM, 1972

NO. 72-1505

THE BEHRENS DRUG COMPANY,
Petitioner,

v.

JAMES D. HODGSON, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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To The Honorable Supreme Court of the United States:

Comes now The Behrens Drug Company, as petitioner, and prays the court to issue its writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, rendered herein February 12, 1973, which affirmed a judgment adverse to petitioner in this sex discrimination case brought under the Fair Labor Standards Act.

As grounds for granting the petition, Behrens would show the court as follows:

THE OPINION BELOW

The opinion of the court of appeals had not been reported officially when this petition was printed, but it is supplied in the separate appendix which accompanies the petition.

The federal district court in which the case was tried did not file a written memorandum opinion; it did file findings of fact and conclusions of law which are to be found at pages 204-226 of the appendix filed in the court below which is filed in conjunction with the petition.

JURISDICTION OF THE COURT

The judgment of the court of appeals was rendered February 12, 1973, and is contained in the separate appendix. No petition for rehearing was filed in that court.

Jurisdiction of this court is invoked under *28 U.S.C., §1254 (1).*

THE QUESTIONS PRESENTED FOR REVIEW

1. Whether or not the court of appeals correctly held, under the Fair Labor Standards Act, that petitioner's training program for its sales personnel could not qualify as a "****difference based on any other factor other than sex ***", under *29 U.S.C., §206(d) (1) (iv),* so as to justify a disparate wage differential to male employees in the training

program, on the ground that the training program had no definite termination date.

2. Whether or not the court of appeals correctly held, under the Fair Labor Standards Act, that petitioner's training program could not qualify as a "***differential based on any other factor other than sex***", under *29 U.S.C., §206(d) (1) (iv)*, so as to justify a disparate wage differential to male employees in the program, on the ground that no woman had ever participated in the program.

3. Whether or not the court of appeals correctly held, that the petitioner's training program was not a "***bona fide training program***" as contemplated by the Secretary of Labor's Interpretative Bulletin, *29 C.F.R., §800.148*, and thus did not qualify as a "***differential based on any other factor other than sex***", under *29 U.S.C., §206(d) (1) (iv)*, so as to justify a disparate wage to male employees in the program.

STATUTES AND REGULATIONS INVOLVED

The section of the Fair Labor Standards Act central to this case is *29 U.S.C., §206 (d) (1)* which reads:

> "(d) (1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where

such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee."

Also involved is an interpretative bulletin issued by the Secretary of Labor, found at *29 C.F.R., §800.148*, which reads:

"§800.148 *Examples—training programs.*

"Employees employed under a bona fide training program may, in the furtherance of their training, be assigned from time to time to various types of work in the establishment. At such times, the employee in training status may be performing equal work with non-trainees of the opposite sex whose wages or wage rates may be unequal to those of the trainee. Under these circumstances, provided the rate paid to the employee in training status is paid, regardless of sex, under the training program, the differential can be shown to be attributable to a factor other than sex and no violation of the equal pay standard will result. Training programs which appear to be available only to employees of one sex will, however, be carefully examined to determine whether such programs are, in fact, bona fide. In an establishment where a differential is paid to employees of one sex because, traditionally, only they have been considered eligible for promotion to executive positions, such a practice, in the absence of a bona fide training program, would be a discrimination based on sex and result in a violation of the equal pay provisions, if the equal pay standard otherwise applies."

STATEMENT OF THE CASE

A. The statutory basis for, and the nature of, the cause of action:

The Secretary of Labor, in his official capacity, brought this suit under the statutory authority of *29 U.S.C., §216 (c)*, on behalf of certain employees of The Behrens Drug Company,* on the theory, among others, that Behrens had violated the equal pay provisions of the Fair Labor Standards Act, *29 U.S.C., §206(d) (1)*, by discriminating "***on the basis of sex***" (App. 7, 186)** in the amount of wages paid certain of its male and female employees.

B. The facts pertinent to the issues presented:

The judgments below include findings of discriminatory pay regarding certain classes of employees (i.e. data process supervisors and "checkers") other than those classes alleged to have included employees participating in a "bona fide training program." This appeal does not challenge the decrees below in regard to data process supervisors or "checkers". It is concerned only with that portion of the judgment which affects "order fillers" and city order desk employees, both of which job classifications included male employees, whose wages were used for comparative purposes to establish sex discrimination, who were participants in Behrens' "training program" and which justified their pay scale, so Behrens submits, on a factor other than sex.

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*For clarity, the parties will be referred to as they appeared in the trial court.

**All "App." references are to the "Appendix" filed in the court of appeals which has been certified and filed as a part of the record in this case.

The issue central to this appeal, therefore, centers upon the validity *vel non* of Behrens' training program as a "***bona fide training program***" within the meaning of *29 U.S.C., 206(d) (1) (iv)* and the Interpretative Bulletin previously quoted. The facts pertinent to that issue are as follows:

Behrens is a wholesale drug company in Texas with its general office in Waco and division offices in Austin, Lubbock, Waco, and Tyler. (App. 529, 700.) This case involves only employees in the Tyler division.

Defendant's Tyler division employs numerous persons, both male and female, who work in its warehouse, in the office, or on the outside as sales personnel.

The warehouse, where many of the employees here in question worked, is comprised of a series of rows or stacks of shelves where drugs and merchandise are stored and from which such items are selected by Defendant's employees to fill an individual customer's order. (App. 331-332.) The merchandise shelves in the warehouse, in turn, are divided into six general sections—e.g., Section 1 contains pharmaceuticals, Section 2 contains patent medicines, Section 3 contains a sundry items, et cetera. (App. 333.)

The employees who work in these sections (referred to in the record as "order clerks" or "order fillers") select drugs and merchandise as specified by a customer's order from shelves in their assigned section and place the items in a

movable cart or buggy. (App. 336.) The order and the buggy are passed by employees from section to section until every item on the order has been filled (App. 334-336), after which the entire order is examined by a "double checker" and then packaged for shipment. (App. 334.)

The Tyler division has six sales territories. (App. 539.) A territory assigned to a particular sales person may consist of one town or a group of towns. (App. 529-530.) These sales personnel offer to their customers, and therefore must be familiar with, some 15,500 different items of merchandise, including prescription drugs, proprietaries or patent medicines, cosmetics, drug sundries, and gift items. (App. 531-532.)

Periodically vacancies occur in the Tyler division outside sales territories, quite often with little or no advance notice to the company. (App. 539, 742.) Naturally the Defendant cannot serve its customers in the highly technical field in which it competes with sales people who are either unfamiliar with the drug products or with Behrens' operations in particular. (App. 536, 540.) Even if the company could hire a person experienced in the drug field to fill one of these vacancies, he or she would, nevertheless, have to be trained as to the particular manner in which Defendant conducts its business. (App. 540.) And, if the company is not able to fill a sales vacancy immediately, there is the potential for an adverse loss of business to its competition. (App. 742.)

Thus, in order to fill vacancies as they occur in the sales territories, as early as 1946, Behrens instituted a training

program designed to equip sales trainees with the requisite skill and knowledge to assume the job of selling its 15,500 drug store items. (App. 533.) Persons who participate in Defendant's training program are hired specifically to fill a prospective vacancy in a sales territory and not because of need for any other type of employee. (App. 741.) The training program essentially involves working in various sections of the business, and it begins with familiarization of the warehouse items, generally beginning with patent medicines and proprietaries, by having the trainee fill orders in Section 2. (App. 542.) Upon mastering the merchandise in that section, a trainee is rotated through, and performs the same duties in, the pharmaceutical section, the sundries section, and finally, he is transferred to the city order desk where he receives telephone orders from local customers. (App. 402, 406, 542-543, 578-581, 721.) During this rotation process, trainees have no regular place to work (App. 590), and they are definitely not assigned to work in a particular section because of a personnel need there; they are, in fact, an extra or unneeded employee at any given station. (App. 741.)

When a trainee progresses from assignments in the warehouse to the city order desk, he is given more intensive training in sales and product information. He attends sales meetings (App. 607, 687), he studies sales and product literature (App. 581, 629), he takes certain proficiency tests (App. 582), and he travels in various territories with an experienced salesman. (App. 423, 741-742, 746, 780-781, 794.)

While the length of an individual trainee's progress

through the various phases just described was not precisely determinable (for reasons discussed below), nevertheless, progress through the program was not illusory. Each trainee's familiarization program proceeded from simple to more difficult tasks (App. 356, 795), and, as mentioned, each trainee was moved to the next stage of the program as soon as he had mastered the merchandise and skills requisite to each section. (App. 780-781.) A trainee's readiness for advancement was determined by checking with the supervisor in each section where the trainee worked and by personal interview with the trainee. (App. 778.) A trainee was informed each time he had successfully completed a phase of the program (App. 765), and trainees were specifically told when they had completed the entire program regardless of whether a sales opening then existed. (App. 765.)

The training program under consideration was not merely an opportunity to work up through the company as the Secretary would contend. Indeed every person hired in Defendant's training program is specifically hired as a sales trainee (App. 535, 723); each employee understands that he is a sales trainee (App. 538, 576, 578, 740, 758, 818); and the other employees in the division understand that also. (App. 280, 403.) Participants in the program are required to conform to a uniform educational background (App. 815), and each applicant must achieve a score on a pre-employment test greater than that required of regular employees. (App. 810.) Significantly, every person hired for Behrens' training program is "guaranteed" or "assured" (App. 595-596, 598-599, 605, 758, 831) a sales territory as soon as one

becomes available after completion of the training program. (App. 623, 758, 793.) Sales trainees are well aware of the fact that after completion of their training period, they might have to wait a certain length of time until a sales territory opened up. (See App. 583, 690-691.)

Though it is true that, for very good and sufficient reasons,* the training program was not formally reduced to writing** (App. 702), the plan had followed the same basic routine since its inception in 1946 (App. 744, 818), and parties participating in it were made aware of the routine before the program commenced. (App. 623-624.)

It is true—though for equally good and sufficient reasons—Behrens' training program had no predetermined, formal completion date (App. 551), although, as a practical matter, the program terminated when a trainee had successfully progressed through the merchandise sections of the warehouse and had sufficiently mastered skills at the city order desk. (App. 720-721, 795.) As mentioned, all trainees were informed when they had successfully completed the training program, which terminated at the city order desk, regardless whether a sales territory was vacant at that time or not. (App. 765.)

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*At times, Behrens can hire trainees with previous experience in the drug business (e.g., App. 794) who are, therefore, able to familiarize themselves with the merchandise more quickly than trainees with no prior experience; the latter trainees take much longer to master the merchandise and become qualified sales representatives. (App. 540, 702-703, 794.) That makes it very difficult for Behrens to spell out in writing its program insofar as it might apply to a given trainee. (App. 702.)

**The basic plan of the program was outlined in a letter given to at least one sales trainee. (App. 635.)

The reason the program had no fixed termination date was dictated by factors inherent in Defendant's business, to-wit: First of all, for the reasons outlined in the footnote at page 10, it could not be determined when a given trainee might complete the program and be qualified to assume a sales territory; because of their backgrounds, some trainees completed the program faster than others. Second, although Behrens did know that it would always need to have some sales trainees ready to assume a territory (App. 741), because of the size of Behrens' operations out of the Tyler division, the turnover among its outside sales personnel was not of such regularity that Defendant could predict the number of replacements it would need at any given point in time. (App. 535, 539, 741.)

The lack of a specified termination point for the program, however, is an aspect of it more *pro forma* than real. Since January 1, 1968, the general period under consideration in this case, *every* sales trainee who completed the program was assigned a sales territory. (App. 767.) Since that time, eleven people had been hired in the Tyler division as sales trainees, and five became salesman. (App. 165-167.) Of those five, only one of them was in the training program for as long as twelve months, the other four were in training for seven months, twenty-three days, or less. (App. 165-167, 503-508.)* Moreover, regardless of the progress of any individual trainee, the length of the entire program for all

*Of the six who did not become salesmen, four quit after one month, twenty six days, or less, and the other two did not demonstrate sufficient progress in the program (App. 503-507, 796-799); i.e., Mark Meadows was removed from the program after nine months and reclassified and Julius Horton, who was prone to absenteeism and could not get along with other employees, quit after fifteen months. (App. 797.)

trainees could be predicted to last between six and twelve months. (App. 794.)

Also because of factors inherent in the job,* no woman had applied for, or completed, Defendant's training program since its inception. (App. 551.) That is not to say, however, that the program was not open to women; in fact, two women had been considered for outside sales positions (App. 552, 718) and one woman had been offered such a position in the Tyler division but refused. (App. 441-449, 785.) Defendant's local division managers were perfectly free to hire women as sales trainees (App. 553), and no woman had ever been refused participation in the training program. (App. 784.) Thus, the lack of any woman participant in the program was not due to any arbitrary rule or policy established by Behrens. The fact of the matter is that, apparently because of the inherent conditions noted below, no woman had ever applied to the company for a sales trainee's job and no woman had ever been referred to the company by the Texas Employment Commission for such position. (App. 784, 808.)

Defendant has never denied that, on occasion, some of its male trainees were paid more than some of its order fillers or city order desk employees for essentially the same type of work. That is not a generalization which applied in every instance, however. As a matter of fact, during thirty of the thirty-six months about which the Secretary made proof, at least one, and sometimes as many as four, lady

*When Behrens' program was originated in 1946, just after the war, travel by automobile was not as safe or reliable as it is now, and was thus unappealing to women, plus the fact that state laws were not conducive to employing women in jobs which required irregular, lengthy hours of work. (App. 546.) In more recent years, the requirement that Behrens' sales people be away from home, working irregular hours, often at night and on weekends, has made the job unattractive to women, especially those with families. (App. 760-761.)

order fillers were paid more than trainees during the same period of time. (See App. 860-862, Plaintiff's Exhibit No. 9, and Defendant's Exhibit No. 1.) Moreover, during the approximately five or six months when the trainee rate in all of Defendant's divisions was higher than the hourly pay of any lady order filler, there was no trainee actually employed in the Tyler division. (See Plaintiff's Exhibit No. 9 and Defendant's Exhibit No. 1.)

C. The judgments below:

The trial court filed findings of fact and conclusions of law in which it found, insofar as pertinent to the issues on appeal here:

> 1. That Behrens' trainees and order clerks engaged in the performance of work which required substantially equal skill, effort, and responsibility (Finding IV, App. 211), and that female order clerks were paid a lower wage than male trainees for performing the same work. (Finding V, App. 211-212.)
>
> 2. That trainees and city order desk employees engaged in the performance of work which required substantially equal skill, effort, and responsibility (Finding VI, App. 212-213), and that female city order desk employees were paid substantially lower wages than male trainees for the same work. (Finding VII, App. 214.)
>
> 3. That Behrens' training program was not a "bona fide training program," citing its informality, its indeterminate length, the percentage of trainees who eventually became salesman, and the lack of any female participants in the program. (Finding XI, App. 218-220; Conclusion VII, App. 224-225.)

4. That Behrens had violated *29 U.S.C., §206(d) (1)* in respect to wages paid female order clerks and female city order desk employees. (Conclusion VII, App. 225.)

In accordance with its findings and conclusions, the trial court enjoined Defendant from further violations of the Act (App. 227), and awarded back wages in favor of those female employees found to have been discriminated against. (App. 227-228.)

The court of appeals struck down Defendant's training program as a valid *29 U.S.C., §206(d) (1) (iv)* exception for two reasons: (1) Because the program did not have a predetermined termination date (Opinion 9-10), and (2) because no woman had ever participated in the program. (Opinion 10-11.)

REASONS FOR ALLOWING THE WRIT

The principles of law which actually control this case are both simple and undisputed, to-wit: First, *29 U.S.C., §206 (d) (1) (iv)* affirmatively recognizes, as an exception to the equal pay provisions of the Fair Labor Standards Act, a disparate wage differential between males and females which is solely occasioned by "***a differential based on any other factor other than sex." Second, under the Secretary's own interpretative bulletin *(29 C.F.R., §800.148)* an employee's participation in a "***bona fide training program***" qualifies as one of the "other than sex" factors invisioned by exception (iv).

What constitutes a "bona fide training program" within the statutory exception, however, has not been the subject of such precise definition or agreement. The Act itself does not undertake to establish any exception (iv) criteria, and, as the government's own witness conceded, the Department of Labor itself has not published any guidelines "***which establish what an employer can do in order to have a bona fide training program***." (App. 510-511.) Nor have the officially reported cases which have considered the problem* been of much help, either; they have merely attacked the negative aspects of programs which they have considered without affirmatively establishing any criteria by which to judge a "bona fide training program". Thus, the Defendant here, in any valid attempt to qualify its training program under *29 U.S.C., §206(d) (1) (iv)*, was left as a guideline only the phrase "bona fide", as used in the Interpretative Bulletin, and its own experienced, honest business judgment—for the good faith exercise of which the Secretary now seeks to penalize the company.

Interestingly, the program which Behrens did formulate even under those nebulous guidelines very successfully met practically every negative element condemned in the reported cases, to-wit:

> 1. All persons in Behrens' training program were specifically hired as "sales trainees", and those employees knew they were in the company's training pro-

*"Schulz v. First Victoria National Bank, 420 F.2d 648 (5th Cir. 1969); Hodgson v. Fairmont Supply Co., 454 F.2d 490 (4th Cir. 1971); Hodgson v. Security National Bank of Sioux City, 460 F.2d 57 (8th Cir. 1972); Hodgson v. Industrial Bank of Savannah, 347 F. Supp. 63 (D.C. Ga. 1972).

gram for a sales position. (See *First Victoria National*, supra, at page 655, and *Security National*, supra, at page 61.)

2. Trainees rotated through various sections of the business regardless of personnel need or business demands; they were periodically and regularly rotated out of each section and as soon as they had mastered the requisite skills in each. (See *First Victoria National*, supra, at page 655, and *Security National*, supra, at page 61.)

3. The rotation of trainees conformed to an established plan or procedure for rotating all trainees which plan was not varied according to the individual trainees; this plan of rotation was separate and distinct from the work assignments of regular employees. (See *First Victoria National*, supra, at page 655, and *Fairmont Supply Company*, supra, at page 498.)

4. There was no regular place of employment for trainees; none of the work assignments for trainees was permanent. (See *Industrial Bank*, supra, at page 67.)

5. Behrens' trainees were "guaranteed" or "assured" a sales position upon successful completion of the training program, rather than receiving mere assurances of advancement through the business. (See *Security National*, supra, at page 61.)

6. Trainees' acquisition of knowledge was augmented by sales and product literature, sales meetings, first hand knowledge gained by traveling with experi-

enced salesmen, and, thus, their course of instruction was more than the mere acquiring of skills and knowledge through continuous performance of regular tasks. (See *First Victoria National*, supra, at page 655-656.)

7. The Defendant's training program was neither illusory nor indefinite inasmuch as all those participants who completed it followed a regular regimen and were actually placed in a sales position. (See *First Victoria National*, supra, at page 659, and *Security National*, supra, at page 61.)

Defendant's training program was, moreover, invested with indicia of a "bona fide training program" over and above those which have been discussed in the reported cases, for example:

1. Behren's trainees were not eligible for certain bonuses which were available to regular employees alongside of whom the trainees worked. All of Defendant's trainees were paid at the same rate in all of its divisions.

2. Defendant's trainees were required to possess a standard educational background and to demonstrate intellectual potential, determined by testing, in excess of that required of regular employees.

3. And, very significantly, Behrens' training program was clearly not an arbitrary classification merely for the purpose of discriminating between wages paid to male and female employees. The trainee wage rate was uniform throughout all of Defendant's divisions, and, for the balance of time under consideration, some fe-

males earned more money than trainees as they worked side by side at essentially the same tasks.

Indeed, the sum and substance of the training program under consideration was such that the court of appeals was impelled to concede that it successfully avoided the general vice inherent in every training program condemned to date under the Act—i.e. that it was too illusory to be called a program at all and/or was nothing more than a "***post-event justification for disparate pay to men and women***." (420 F.2d 648.) Specifically, the court remarked:

> "***The Behrens' training plan is not a post-event justification. Behrens' sales trainees enter employment with explicit knowledge of their training status. They rotate through the initial warehouse positions without regard to personnel needs, and they receive some formal sales training while serving as city order clerks.
>
> * * * * *
>
> "Behrens' sales training procedure is not illusory, nor does it constitute a mere post-event justification for disparate wage payments.***" (Opinion 8,11.)

Thus, there should be no question, at this point, that Behrens' training program was real, operative, as definite as it could be, and maintained solely for legitimate business reasons. Out of the totality of facts which establish the genuineness of the program, only two narrow (and, we submit, non-controlling) factors are cited by the court below to deny the program exception (iv) status, viz:

> *1. Lack of a definite termination date:* To condemn Behrens' otherwise valid training program because

"***the termination point of the program is not determinable prior to its actual occurrence***" (Opinion 9-10) is really more a condemnation of the size and nature of Defendant's business than it is a condemnation of the *bona fides* of the training program. Neither the Secretary nor the court of appeals disputes the fact, affirmed by Behrens' president, that:

> "***We have never been large enough to have a formal sales training program—we're too small a company for that. There are two of our competitors in this state that do have formal training programs—one is McKesson & Robbins, but then they've got about ninety divisions in the United States; the other is Southwestern Drug—they have some twelve or fourteen divisions. And they do have a formal training program. Ours, of necessity, must be whatever we can work up really." (App. 535.)

To condemn Defendant's training program on the spurious ground that it is not confined to a pre-determined number of days or weeks thus condemns all bona fide training programs in businesses whose operations are not so extensive that employee turnover can be refined to a statistical norm or where potential trainees possess varying qualifications which vastly effect the length of their training period. The court of appeals, at the behest of the Secretary, thus apparently says to small businesses, such as Behrens, who cannot compete with "corporate giants" (Opinion 13): "You cannot have a training program, or, at least if you do have one, you automatically violate the Fair Labor

Standards Act if any trainee therein makes more than a female employee doing comparable work." The depressive effect which such result could have upon the right and ability of small businesses to provide themselves capable employees and to offer economically attractive employment opportunities in technical fields is thus calculated to stifle the employment opportunities of both men and women—an effect which, we believe, *§206 (d) (1)* was not intended to have.

One legal fallacy in the court of appeals insistence that a pre-determined termination point is a *sine qua non* of a valid training program is that it is a slavish insistence upon paper formality in total disregard of reality. That is particularly evident by the facts of this case. It will be recalled that all employees hired as sales trainees by Behrens were "guaranteed" or "assured" sales territories; that all trainees who completed the program during the period under consideration were assigned sales territories; that of the five persons who completed the program during the period of time in controversy only one was in training as long as twelve months and the other four were in training less than eight months; that, as a practical matter, the training program had reasonably predictable limits for all employees ranging between six and twelve months; that all trainees were specifically informed when they had completed the program regardless of the existence of a sales territory; and that the participants in the program were aware of all of the foregoing factors.

Thus, in actual operation Defendant's training program did terminate within reasonably predictable limits of which its participants were aware. *A fortiori*, even if Behrens, merely to satisfy formality, had placed an ultimate time limit on its training program, it would have meant little or nothing to the actual placement of trained sales personnel in the field, because of the unpredictability of Defendant's employee turnover. In any given instance, a Behrens trainee might still have to wait, after the completion of the training program, for a sales territory to become available. Therefore, insofar as Defendant's training program is concerned, the establishment of a set termination date would achieve nothing more than permitting a trainee to know the precise date when he had completed the program—a fact which all of Behrens' trainees knew anyway. And, even at that, a fixed termination date would have to be set by Behrens equal to the longest period of time necessary to train a person wholly inexperienced in the drug field, and there would always remain those individual trainees who could complete the program much faster. Obviously, the requirement of a fixed termination date is impractical, unrealistic, and, more significantly, wholly irrelevant to the validity and effectiveness of the program itself.

A second legal fallacy in the court of appeals' "termination point" requirement is the total irrelevance of such requirement to any *mala fides* in the program. There is not a scintilla of evidence, i.e., a hint or suspicion, that Defendant's training program was operated

without a precise termination point *merely* to justify paying male employees more than females or to establish an arbitrary employee classification for discriminatory purposes. As a matter of fact, the evidence is that all employees in training by Defendant were aware of their progress through the phases of the program and were told when the program *in toto* was complete. The evidence is that the program was not definitely terminable—indeed, could not be—solely because of the unpredictability of employee turnover and because of varying qualifications of potential trainees which caused some to be more rapidly trainable than others.

Behrens concedes that an indeterminate training program could be used as a harbor for an arbitrary classification of employees, and that the lack of a definite termination point is one of several factors which may be weighed in the balance to determine the existence *vel non* of a "bona fide training program". However, when that single factor, as here, does not result in the maintenance of a static, arbitrary employee unit, when it exists, as here, as part of a training program which conforms to every other qualification of an otherwise valid program, and when the lack of a definite termination point, as here, is compelled by legitimate business reasons unrelated to discrimination, that single fact should not be permitted to assume the character of a drop of water which pollutes an entire stream. To so permit would be contrary to the Interpretative Bulletin and the very idea behind the creation of exception (iv).

The court of appeals was in error in so holding.

2. The lack of female trainees: The lower court's additional holding that Defendant's training program was not "bona fide" because no female had ever participated in it is a result not of a correct interpretation of the Act but of a gross misconception of the ultimate issues involved in assessing what constitutes a "bona fide training program" contemplated by exception (iv) and the Interpretative Bulletin.

A clear line of distinction in cases of this nature must be drawn between the *fact* of male dominance *per se* and male dominance which results from employer *rule* or *arbitrary classification.* As is obvious from the holding in *Hodgson v. Fairmont Supply Co., supra, 454 F.2d 490 (4th Cir. 1971),** it is only in the latter instance (i.e., where women are affirmatively excluded from a training program by employer rule or classification) that male dominance can constitute a negative factor which, standing alone, prevents a training program from being "bona fide". Even at that, such prohibited form of male dominance would seemingly first need to be established as a violation of the Civil Rights Acts of 1964. The court below recognized that when it held:

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*That court held: "Our second reason for disagreement is that the sales training program was sex oriented and *not made available to women.*" (454 F.2d 498, emphasis added.) The same factor (male dominance) was also relied upon in *Hodgson v. Security National Bank of Sioux City, 460 F.2d 57 (8th Cir. 1972)* upon the holding that the defendant failed to *prove* that its program was not restricted to males. Apparently, the *Security National* court would have been satisfied with Behrens' proof when it showed, among other things, that a woman had been offered a trainee position. (See 460 F.2d 62.)

> "Second, the Behrens program is male dominated. No woman has ever participated in the program. While it is true that the issue of whether trainee positions should be open to women is a question to be ultimately resolved only in an action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1970), in the manner pursued in *Diaz v. Pan American World Airways, Inc.*, 5 Cir. 1972, 442 F.2d 385; see *Hodgson v. Golden Isles Nursing Home*, 5 Cir. 1972, ... F.2d ..... [No. 71-1994, Oct. 31, 1972], it is also true that 'training programs which appear to be available only to employees of one sex will * * * be carefully examined to determine whether such programs are, in fact, bona fide.' 29 C.F.R. § 800.148." (Opinion 10.)

Defendant's training program has not been condemned under Title VII, and, as far as this record is concerned, it is not subject to being so. As a matter of fact, the evidence affirmatively establishes the converse.* Accordingly, the fact of male dominance in Defendant's training program was a fact only, apparently occasioned by characteristics of the job itself (as more fully discussed at page 12, supra) which made it unappealing to women—a factor which does not condemn Defendant's program even under Title VII of the Civil Rights Act of 1964. See *Hodgson v. Brookhaven General Hospital, 436 F.2d 719, 727 (5th Cir. 1970).*

Inasmuch as it was not shown that Behrens' training program was unavailable to women by rule or order of the employer, "male dominance" cannot and should

*Recall the evidence shows that Behrens' division managers were free to hire women; that women were not discouraged from becoming sales trainees, that women had, in fact, been considered for the program, and that a trainee's position had been offered to one woman.

not assume the status of an ultimate, controlling criterion upon which the validity of the program will either stand or fall. Rather, the mere *fact* of male dominance—which is all that was shown here—is, under the Secretary's Interpretative Bulletin, significant only insofar as it may increase the employer's burden of proving a (iv) exception or may call into play a more stringent standard of review in determining the validity of a training program. That is precisely what the Interpretative Bulleting says—and no more:

> "***Training programs which appear to be available only to employees of one sex will, however, be *carefully examined* to determine whether such programs are, in fact, bona fide.***" (Emphasis added.)

Behrens not only accedes to the careful examination required by the Interpretative Bulletin occasioned by the male dominance of its program, but actually welcomes it because of what such careful examination reveals. It reveals a training program, established for approximately twenty-five years, which is real, effective, and as precisely defined as it can be in Defendant's business; it reveals a program which has consistently and successfully placed its participants in the sales positions for which they were hired, it reveals a program which has been operated with no attempt at subterfuge or discrimination, and it reveals a program which even the appellate court reviewing it conceded was "***not illusory, nor does it constitute a mere post-event justification for disparate wage payments.***" (Opinion 11.) If such findings are the end result of the most "careful" examination to which a training program can be subjected under

29 U.S.C., § 206 (d) (1) (iv), one can legitimately ask: What more does the Act or the Interpretative Bulletin require?

Where the lower court obviously erred, therefore, was in using "male dominance" not as the springboard from which to launch a careful examination of Defendant's training program, but as a single, ultimate criterion of the program itself. As mentioned, there is nothing in the Act or the Interpretative Bulletin which so requires; indeed, the wording of the Interpretive Bulletin, quoted above, affirmatively negates any notion that the mere fact of "male dominance" assumes such an exalted position. It undoubtedly does so because the Fair Labor Standards Act is not the place to resolve that issue. Accordingly, Defendant's submits that the court of appeals was materially in error in holding that "male dominance" alone was a factor fatal to the existence of a valid training program. The only consequence of that fact—careful examination—has been met and passed by this Defendant's training program.

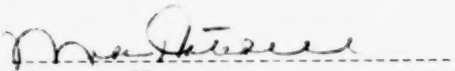
CONCLUSION

Defendant believes that the genuineness and effectiveness of its training program speaks for itself. When the Congress of the United States, the Department of Labor and the federal courts of appeals are able to give employers no concrete guidelines for the establishment of training programs which would qualify under *29 U.S.C., § 206 (d) (1) (iv)*, other than the broad phrase "****bona fide***", it is rather a strange result to penalize an employer for the operation of a program, like Defendant's, which conforms in

every respect to the common understanding of the phrase "bona fide". But, to do so on the basis of two isolated criteria, nowhere specified in the Act or the Interpretative Bulletin, which have no practical effect at all upon the genuineness, effectiveness and good faith of the program, seems to Defendant more an attempt to snare employers in a semantical trap than it is to further the beneficial, legitimate ends of the Fair Labor Standards Act. We reiterate again the deleterious effects which the decision below will have upon good faith training programs of small and moderate-sized businesses all across the nation, and we suggest that the judgment below is completely out of harmony with *29 U.S.C., § 206 (d) (1) (iv)*, and the Interpretative Bulletin on a substantive federal question which has not been, and should be, settled by this court. *Rule 19 (1) (b), Rules of the Supreme Court of the United States.*

For the reasons stated above, therefore, Defendant-Petitioner prays the court to issue its writ of certiorari to review the judgment of the Court of Appeals for the Fifth Circuit rendered herein February 12, 1973.

Respectfully submitted,



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CERTIFICATE OF SERVICE

It is hereby certified that three copies of the foregoing Petition for Writ of Certiorari have been served upon the following persons, as counsel for Respondent, by placing the same in a United States mailbox, properly addressed with first class air-mail postage prepaid, on this the 4th day of May, 1973: Hon. Richard F. Schubert, Solicitor of Labor, Hon. Carin Ann Clauss, Associate Solicitor, Hon. Donald S. Shire and Hon. Anastasia T. Dunau, Attorneys at Law, U. S. Department of Labor, Room 4141 Main Labor, 14th and Constitution Avenue, N. W. Washington, D. C. 20210, and Hon. George T. Avery, Regional Solicitor and Hon. Truett E. Bean, Deputy Regional Solicitor, U. S. Department of Labor, Federal Building and U. S. Courthouse Room 7C52, Dallas, Texas, 75202.

Mike A. Hatchell

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In The

Supreme Court of The United States

OCTOBER TERM, 1972

NO. 72-1505

THE BEHRENS DRUG COMPANY,
Petitioner,

v.

PETER J. BRENNAN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
Respondent.

APPENDIX

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In The

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-1680

JAMES D. HODGSON, Secretary of Labor,
U.S. DEPARTMENT OF LABOR,
Plaintiff-Appellee,

versus

THE BEHRENS DRUG COMPANY,
Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Texas

(February 12, 1973)

Before RIVES, THORNBERRY and GOLDBERG,
Circuit Judges.

RIVES, Circuit Judge: In this case brought by the Secretary of Labor under the Fair Labor Standards Act, the district court found that Behrens Drug Company (hereinafter

Behrens) discriminated against certain female employees by compensating them at a lower rate than their male counterparts. Behrens appeals, arguing that each contested male-female wage differential rests on legitimate grounds—that the males involved are either participating in a bona fide training program or performing unequal work.

The Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1),[1] an amendment to the Fair Labor Standards Act of 1938, prohibits sex-based wage discrimination between employees performing equal work under similar conditions. The Secretary of Labor, commissioned champion of the female worker by the Act,[2] brought this action on behalf of several female employees in Behrens' Tyler, Texas, warehouse.

The district court, after finding that Behrens breached the Equal Pay Act, entered judgment enjoining Behrens from further violations of the Act's equal pay requirements and restraining the continued withholding of $17,423.99 in back

[1] "(d)(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee."

[2] 29 U.S.C. § 206(d)(3) provides the authority for the Secretary to act on behalf of the workers by stating that,

> "For purposes of administration and enforcement, any amounts owing to any employee which have been withheld in violation of this subsection shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this chapter."

And 29 U.S.C. § 216(c) empowers the Secretary to bring civil action on behalf of employees to recover such "minimum wages or unpaid overtime compensation."

wages found due as a result of Behrens' violations. The district court ruled that Behrens paid four separate categories of female workers a discriminatorily low wage. Behrens appeals the ruling as to each category.

I. *ORDER CLERKS*

For many years Behrens has employed females in its Tyler division warehouse as "order clerks." The principal responsibilities of an "order clerk" include: arranging merchandise on the warehouse shelves, filling customer orders by gathering the requested stock and sending it along to the "checker," and restocking the shelves. [App. 211.] Behrens admitted and the district court found that certain male employees, designated "sales trainees," performed work substantially equal to that of the female "order clerks" during the period in question. [App. 211.]

Behrens acknowledged that the male "sales trainees" were paid a higher wage than "order clerks" for doing the same work, but sought to justify this wage discrepancy as based on a bona fide training program, purportedly constituting a legitimate distinguishing factor other than sex.

29 U.S.C. § 206 (d) (1) recognizes four exceptions to the general prohibition of disparate wage payments between workers of the opposite sex. The first three exceptions to the Equal Pay Act are specific (a seniority system, a merit system, and a system which measures earnings by quantity or quality of production), but the last is stated in general terms—"any other factor other than sex," 29 U.S.C. § 206

(d) (1) (iv). 29 C.F.R. § 800.148,[3] the Secretary's Interpretative Bulletin, expressly designates bona fide training programs as one factor other than sex which may validly produce a male-female wage gap. Behrens contends that its male "sales trainees" are all participants in a bona fide training program, providing a legitimate basis for their higher wage rate than that of female "order clerks."

In order to verify the structure of its training program, Behrens offered the testimony of its president, treasurer, Tyler division manager, and four salesmen.

Behrens' president, W. Lacy Clifton, admitted that his company's sales training program has never included a woman. [App. 553.] He sought to explain the program's male dominance by reference to its origin:

> "I would say that when this program was started [1946] that females were never considered as suitable for traveling. . . . You think about putting a female out on a job where she might have a flat tire at night." [App. 546.]

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[3] "§ 800.148 *Examples—training programs.*

"Employees employed under a bona fide training program may, in the furtherance of their training, be assigned from time to time to various types of work in the establishment. At such times, the employee in training status may be performing equal work with non-trainees of the opposite sex whose wages or wage rates may be unequal to those of the trainee. Under these circumstances, provided the rate paid to the employee in training status is paid, regardless of sex, under the training program, the differential can be shown to be attributable to a factor other than sex and no violation of the equal pay standard will result. Training programs which appear to be available only to employees of one sex will, however, be carefully examined to determine whether such programs are, in fact, bona fide. In an establishment where a differential is paid to employees of one sex because, traditionally, only they have been considered eligible for promotion to executive positions, such a practice, in the absence of a bona fide training program, would be a discrimination based on sex and result in a violation of the equal pay provisions, if the equal pay standard otherwise applies."

In recent years, Clifton claimed, inclusion of females in the sales training program has been considered, and one woman, Annette Neeley, was offered a sales job on a temporary basis. Miss Neeley turned the job down for reasons which are contested.[4] However, Clifton admitted that present company policy calls for active solicitation of young men as sales trainees, but not women, and Miss Neeley, while she was offered a sales job, was not offered a position as a sales trainee. [App. 554.]

The district court found and both parties, with minor exceptions, agree that the Behrens' sales training program has the following characteristics:

1) No written or formal plan of training;

2) a regular system of rotation through each of the different warehouse jobs with progression to the next position based on satisfactory familiarity with the position before it;

3) no specific identifiable point of termination;[5]

4) sales trainees are informed upon hiring that they are entering a training program;

---

[4]App. p. 438. The Secretary contends that Miss Neeley refused the job because she was not offered an increase in pay or the incentive of the normal commission arrangement, while Behrens argues that pay was never discussed.

[5]Behrens concedes that its training program lasts for an indefinite period of time, but argues that it ends at an identifiable point—when familiarity with all the warehouse jobs is satisfactorily accomplished and a sales position opens. This circuitous reasoning fails to focus upon an identifiable termination point. Theoretically, a job slot cannot be filled until the training program is successfully completed. Thus, to say that the program ends when the job slot opens implies that completion of the program is not a prerequisite to beginning a sales job. If that is true, then the program's validity is cast in a questionable light.

5) some formal sales training, including meetings, study of sales literature and travel with current salesmen, is provided upon reaching the final job in rotation—the city order desk. [Although the district court made no express finding on this point, testimony to that effect appears at App. pp. 580-582.]

In addition, uncontradicted testimony established that a male trainee carries out productive work and rotates through the training program without regard to personnel needs, except that the final advance to the position of salesman is contingent upon an opening in that slot. [App. 561, 562.]

In the seminal case interpreting the bona fide training program exception to the Equal Pay Act, *Shultz v. First Victoria National Bank*, 5 Cir. 1969, 420 F.2d 648, this Court ruled that two separate male-dominated "executive training programs" for bank tellers did not constitute a factor other than sex which would permit payment of lower wages to female tellers not included in the training programs. Those particular programs were found to be merely "post-event justifications for disparate pay to men and women from the commencement of employment up through advancement." *Shultz*, *supra*, at 655.

The elements of the two bank training programs in *Shultz*, which that court listed as conclusive of their fatal imprecision, were:

1) Employees were not hired with the knowledge that they were trainees.

2) The plans were not in writing.

3) The "rotation" of trainees through the various bank positions did not follow any definite sequence, but depended on personnel needs.

4) No formal instruction was offered at either bank.

5) Neither program had ever included a woman.

6) Advancement to the next position was unpredictable and sporadic.

Faced with these amorphous bank training plans and strongly influenced by the fact that both programs excluded females, the *Shultz* court reasoned that judicial recognition of such programs would allow "the exception to swallow the rule" and effectively undermine the congressional purpose for passing the Equal Pay Act.[6]

A cursory comparison of the training programs belatedly offered as justification for the unequal pay in *Shultz* with the program at issue here reveals that the latter is far more concrete than were the former. The Behrens training plan is not a post-event justification. Behrens' sales trainees enter employment with explicit knowledge of their training status.

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[6] "Sec. 2. (a) The Congress hereby finds that the existence in industries engaged in commerce or in the production of goods for commerce of wage differentials based on sex—

(1) depresses wages and living standards for employees necessary for their health and efficiency;

(2) prevents the maximum utilization of the available labor resources;

(3) tends to cause labor disputes, thereby burdening, affecting, and obstructing commerce;

(4) burdens commerce and the free flow of goods in commerce; and

(5) constitutes an unfair method of competition.

"(b) It is hereby declared to be the policy of this Act, through exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct the conditions above referred to in such industries."

Public Law 88-38 (1963), 77 Stat. 56.

They rotate through the initial warehouse positions without regard to personnel needs, and they receive some formal sales training while serving as city order clerks.

Yet, because of the crucial weaknesses in the Behrens training program, which will be treated subsequently, coupled with the genuine concern for women's rights which prompted the Act,[7] we feel that the principles enunciated in *Shultz* are applicable here.

The Behrens sales training program suffers from two principal weaknesses. First, the Behrens trainee's ultimate advancement to the position of salesman depends on, not only satisfactory completion of the training program, but also the fortuitous event of a sales opening. In other words, the termination point of the program is not determinable prior to its actual occurrence, and that termination point is subject to the vagaries of the business climate and the company's personnel needs.

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[7] "Representative Donahue speaking in behalf of this legislation characterized the need for the Equal Pay Act to eliminate these assumptions:

"'We all realize that the origin of the wage rate differential for men and women performing comparable jobs is the false concept that a woman, because of her very nature, somehow or other should not be given as much money as a man for similar work. This antiquated concept has been long and completely demonstrated to be false and it is indefensible from every standpoint. This being so, we may wonder why this legislation is necessary.

"'The answer is furnished to us in the authoritative information provided by witnesses before the House Committee on Education and Labor and the impressive array of statistics unhappily proving that discrimination in wage payments, on the basis of sex alone, continues to exist even in this modern space age.

"'Recognizing that the concept of wage payment discrimination against women is false; having before us the surprising but overwhelming evidence that such discrimination still continues to exist; * * * this measure represents the correction of basic injustice being visited upon women in many fields of endeavor * * * extending simple wage justice to the increasing corps of America's working women.'

109 Cong. Rec. 9212." *Shultz*, *supra*, 420 F.2d at 656 n. 17.

Second, the Behrens program is male dominated. No woman has ever participated in the program. While it is true that the issue of whether trainee positions should be open to women is a question to be ultimately resolved only in an action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000c (1970), in the manner pursued in *Diaz v. Pan American World Airways, Inc.*, 5 Cir. 1972, 442 F.2d 385; see *Hodgson v. Golden Isles Nursing Home*, 5 Cir. 1972,—— F.2d—— [No. 71-1994, Oct. 31, 1972], it is also true that "training programs which appear to be available only to employees of one sex will * * * be carefully examined to determine whether such programs are, in fact, bona fide." 29 C.F.R. § 800.148

Male-dominated training programs subject to the close scrutiny required by § 800.148 have failed to pass appellate tests with increasing frequency. See *Hodgson v. Security National Bank of Sioux City*, 8 Cir. 1972, 460 F.2d 57, reversing a district court decision ruling that a male-dominated bank management training program was bona fide. See also *Hodgson v. Fairmont Supply Co.*, 4 Cir. 1972, 454 F2d 490, where the Fourth Circuit (reversing the district court) found a violation of the Equal Pay Act, and declined to recognize a sex-oriented sales training program.

The spirit behind the Equal Pay Act was eloquently depicted in *Shultz v. Wheaton Glass Co.*, 3 Cir. 1970, 421 F.2d 259, 265:

> "The Act was intended as a broad charter of women's rights in the economic field. It sought to overcome the age-old belief in women's inferiority and to eliminate

> the depressing effects on living standards of reduced wages for female workers and the economic and social consequences which flow from it."

In light of this enunciation of the clear purpose of the Equal Pay Act, a training program coterminous with a stereotyped province called "man's work" cannot qualify as a factor other than sex. *Hodgson v. Fairmont Supply Co., supra* at 498.

In the instant case, Behrens' president, Clifton, testified that women are not solicited as sales trainees because "females were never considered as suitable for traveling." This is a clear example of the attitude of male suitability designed to be nullified by the Equal Pay Act.

Behrens' sales training procedure is not illusory, nor does it constitute a mere post-event justification for disparate wage payments. Nevertheless, the program has never included a female, and its completion—advancement to a sales job—is entirely dependent on personnel needs. These two program characteristics compel the conclusion that Behrens' training procedure is not a factor other than sex which should excuse denial of equal pay to female workers and remove them from the aegis of the Equal Pay Act.

> "An exemption from the coverage of the Act 'must be narrowly construed.' *Phillips, Inc. v. Walling*, 324 U.S. 490, 493, 65 S.Ct. 807, 808, 89 L.Ed. 1095 (1945) and *Mitchell v. Stenson*, 1 Cir., 1954, 217 F.2d 210, 214. The exemptions must be applied only to those 'plainly and unmistakably within its terms and spirit.' *Phillips, Inc. v. Walling, supra* at 493. See also *Arnold v. Ben*

Kanowsky, Inc., 361 U.S. 388, 392, 80 S.Ct. 453, 456, 4 L.Ed.2d 393 (1960)."

Hodgson v. Colonnades, Inc., 5 Cir. 1973, —— F.2d —— [No. 72-1029, January 16, 1973].

Until they reach the position of city desk clerk, Behrens' sales trainees participate in no training activities independent of their regular, productive jobs. This fact reinforces the conclusion that male trainees through most of the training period engage in exactly the same activities as female nontrainees and do not warrant statutory exemption from the Equal Pay Act.

Behrens advances two subsidiary arguments in support of its training program. First, it contends that the term "bona fide training program" contained in 29 C.F.R. § 800.148 means simply "in good faith without fraud." Although the traditional, common law definition of "bona fide" may be as liberal as Behrens' claims, see *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, the term as used in the regulation at issue here must be construed in light of the statute which that regulation implements. The Equal Pay Act clearly mandates the demise of sex-based wage differences except in special, narrow circumstances. A bona fide training program to constitute a valid exception to the Equal Pay Act must represent more than an honest effort; such a program must have substance and significance independent of the trainee's regular job.

Behrens also argues that to rule its "training program" invalid would discriminate against small companies, like itself, who cannot maintain expensive, formal training

courses.[8] Certainly, a small corporation with limited resources need not implement as elaborate a training program as those of the corporate giants. But the fact that a corporation is small does not relieve that corporation of its duty to establish a "bona fide training program," if it wishes to escape the mandate of the Equal Pay Act. In addition, all "training programs" which exclude females, whether originated by large companies or small, carry a stigma of suspect validity.[9]

II. *CITY ORDER DESK EMPLOYEES*

Employees assigned to work at the city order desk in Behrens' Tyler warehouse take orders by telephone from local customers and fill out the necessary order blanks. The district court found that during the period in question three females and four males worked as city order desk employees in the Tyler division.[10] Those employees were found to have engaged in equal work, but female employees were paid at substantially lower rates. [App. 214.]

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[8]We note in passing that Behrens' annual sales volume has regularly exceeded $1,000,000. Thus, Behrens is only small in relation to the corporate giants.

[9]The district court found as a matter of fact that female order fillers were paid substantially less than male "trainees" performing the same work. [App. 211.] Behrens contests the validity of that factual finding, but after careful study of the record, we do not find the district court clearly erroneous.

[10]App. pp. 212, 213.
Females:
Annette Neeley—Jan. 1, 1968 to Dec. 31, 1970
Treva Coomer—Oct. 1, 1968 to Dec. 31, 1970
Patricia Kolb—Nov. 30, 1970 to Dec. 31, 1970
Males:
Jack Carney—Jan. 1, 1968 to Mar. 2, 1968
Martin Connor—Jan. 1, 1968 to Mar. 2, 1968
Tommy Ball—Feb. 28, 1970 to July 4, 1970
Thomas Bailey—Dec. 7, 1970 to June 1, 1971

Behrens concedes that male and female city desk clerks perform equal work for which the females receive lower pay, but contends that its "sales training program" removes that difference from the interdiction of the Equal Pay Act. For the reasons already stated, we disagree.

III *DATA PROCESSING DEPARTMENT SUPERVISORS*

A. *Equal Work*

From January 1, 1964 until June 1, 1966, Behrens employed David K. Blavier, a male, as supervisor of its data processing department in the Tyler division. On termination of Blavier's employment in June 1966, Delores Wooley, a female, took charge of the data processing department. The district court found that David Blavier was paid a salary of $435.00 per month, the equivalent of $2.06 per hour, at the time of his resignation. [App. p. 217.] Delores Wooley, on the other hand, was started in the supervisor job at $1.55 an hour, and her employment has continued at rates substantially less than those paid Mr. Blavier at the time of his resignation.

Behrens argued at trial that the disparate wage payment between Blavier and Wooley was justified by extra work which Blavier performed while employed as supervisor. The district court rejected Behrens' argument and ruled that,

> "These male and female employees [Blavier and Wooley] during their respective periods of employment were employed to perform equal work on jobs, the

performance of which required equal skill, effort and responsibility, and they worked under similar working conditions although their employment was not concurrent. 29 U.S.C. § 206 (d). *Shultz v. First National Bank of Orange*, 61 L.C. 32,269; *Wirtz v. Koller Craft Plastic Products, Inc.*, 58 L.C. 32,076; Department of Labor Regulation, Code of Federal Regulations, Title 29, Part 800, Section 800.114(b) & (c)."

[App. 223.]

Although the Secretary has the burden of proving that the work is equal, Congress in prescribing "equal" work intended to codify a remedial measure which requires not that jobs be identical, but only that they must be substantially equal. *Shultz v. Wheaton Glass Co., supra*, 421 F.2d 259, 265, *cert. denied* 398 U.S. 905; *Hodgson v. Brookhaven General Hospital*, 5 Cir. 1970, 436 F.2d 719, 725. And the Equal Pay Act applies to jobs held in immediate succession, as well as simultaneously.[11]

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[11]29 C.F.R. § 800.114(b):

"(b) Section 6(d) (1) prohibits discrimination on the basis of sex in the payment of wages to employees 'for equal work *on jobs*' which are equal under the standards which it provides (emphasis supplied). (See the discussion in § 800.119, et seq.) The legislative history of the Equal Pay Act expressly refers to the War Labor Board experience as furnishing a guide for testing 'the relationship between jobs' and determining 'equal work' and 'equal skills' for purposes of a 'practical' administration and application of the Act's 'equal pay policy' (see, e.g. S. Rept. 176, 88th Cong. 1st sess., to accompany S. 1409; H. Rept. 309, 88th Cong. 1st sess., to accompany H.R. 6060). Some of the earliest cases confronting the War Labor Board on the application of the 'equal pay for equal work' principle involved situations in which women were being hired to replace men as a result of the manpower shortages. The Board consistently ruled that the principle applied to these situations, as well as to situations where male and female employees performed the same work concurrently and interchangeably, and therefore that women assigned 'to take the place of men' to perform substantially the same jobs 'formerly performed by men' were entitled to the same rate of pay as the men whom they replaced. Rotary Cut Box Shook Industry, 12 W.L.B. Rept. 605, 606, 608; General Electric Co., and Westinghouse Electric Co., supra [Case Nos. 111-17208-D and 111-17209-D, Dec. 12, 1945], at pp. 668-669, 677, 686."

29 U.S.C. § 206 (d) (1) requires equal pay for "equal work on jobs the performance of which requires equal skill, effort and responsibility and which are performed under similar working conditions." In *Hodgson v. Brookhaven General Hospital, supra*, this Court surveyed the expanding number of cases wrestling with the critical criterion of "equal effort," and described the emerging doctrine as holding that,

> "jobs do not entail equal effort, even though they entail most of the same routine duties, if the more highly paid job involves additional tasks which (1) require extra effort, (2) consume a significant amount of the time of all those whose pay differentials are to be justified in terms of them, and (3) are of an economic value commensurate with the pay differential."

436 F2d at 725. Thus, employers may not be permitted to frustrate the purposes of the Act by calling for extra duty from male employees only occasionally, or by requiring male employees to perform tasks normally done by full-time personnel at a lower rate of pay.

The district court found that the primary responsibilities of the data processing room supervisor included: managing the activities of department employees, adjusting malfunctioning data processing machines, and assuming responsibility for departmental errors and priorities. [App. 217.] Both Blavier and Mrs. Wooley performed these functions.[12]

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[12]At one point Behrens advanced, but did not fully develop, the theory that Blavier was a "supervisor" while Mrs. Wooley was merely a "chief operator." See App., p. 731 and appellant's brief, p. 38. But the controlling factor under the Equal Pay Act is not job description, but job content. Hodgson v. Brookhaven General Hospital, *supra* at 724; 29 C.F.R. § 800.121 (1970).

Blavier testified in the district court that while serving as data processing room supervisor he performed several extra duties in addition to management of the data processing department. He worked several hours on Saturday mornings taking orders and delivering merchandise to customers. [App. 648, 669-671.] He occasionally took telephone orders at the city order desk [App. 648], and he drove a delivery truck, infrequently, when specially requested [App. 664]. In addition, he participated in Sunday sales shows two or three times a year [App. 670].

Behrens contends that Blavier's extra duties, not performed by Mrs. Wooley, entail sufficient extra effort on the part of Blavier to justify his higher wage rate. We disagree. Blavier admitted that his primary and principal responsibility was working in the data processing room. [App. 664.] The extra duties performed by Blavier do not satisfy the three-pronged test for inequality of effort delineated in *Hodgson v. Brookhaven General Hospital, supra.* Some of the activities Blavier engaged in did not consume a significant amount of time, and those which did, specifically the Saturday morning duties, were ordinarily performed by full-time employees compensated at a lower rate. See *Shultz v. Wheaton Glass Co., supra* at 263. The district court's interpretation of the facts, leading to its conclusion of equality of effort, strongly reinforces this holding.

The extra duties performed by Blavier, not only fail to meet the *Hodgson v. Brookhaven General Hospital* standard, but also take on reduced significance viewed in light of the fact that the majority of those extra duties were performed on the weekend, while the crucial issue is one involving a discriminatory *hourly* wage rate.

B. *Limitations*

The statute of limitations applicable to actions brought under the Equal Pay Act provides that "* * * every such action shall be forever barred unless commenced within two years after the cause of action accrued." 29 U.S.C. § 255(a). Appellant argues that, since Mrs. Wooley began her duties as supervisor on May 6, 1966, and suit was not brought until December 17, 1970, the cause of action accrued in 1966 and the statute bars this suit. We disagree.

Sex-based, discriminatory wage payments constitute a continuing violation of the Equal Pay Act. See *Shandelman v. Schuman*, E.D. Pa. 1950, 92 F.Supp. 334, 335, and *Mitchell v. Lancaster Milk Co.*, M.D. Pa. 1960, 185 F.Supp. 66, 70, holding that illegal minimum wage and overtime payments constitute continuing violations. The court in *Mitchell*, quoting *Shandelman*, stated that,

> "It is well settled that 'A separate cause of action for overtime compensation accrues at each regular payday immediately following the work period during which the services were rendered and for which the overtime compensation is claimed.'"

To hold otherwise would permit perpetual wage discrimination by an employer whose violation of the Equal Pay Act had already lasted without attack for over two years.

Appellant's reliance on *Unexcelled Chemical Corp. v. United States*, 1953, 345 U.S. 59, and *United States v. Lovknit Mfg. Co.*, 5 Cir. 1951, 189 F.2d 454, *cert. denied* 342 U.S. 896 (1952), is misguided. Those cases held only that a cause of action accrues, giving rise to liability for liquidated

damages under the Walsh-Healey Public Contracts Act, when the minor in question is employed. That narrow holding is not relevant here.

Behrens' wage discrimination is a continuing violation of the Equal Pay Act, and wages due under the Act for the two years preceding this suit are recoverable.

IV. *CHECKERS*

In ruling on the third category of workers, designated "checkers" or "double checkers," the district court found that two female workers were employed in that capacity during the period in question—Edna Newland from January 1, 1968 to June 1, 1970, and Ruth Taylor from November 1, 1970 to December 31, 1970. The court also found that during the same period Behrens employed two males as "checkers"—Julius Horton from January 1, 1968 to June 22, 1968, and Mark Meadows from March 1, 1970 to October 3, 1970. Male and female "checkers" performed the same principal duty—they checked the merchandise to be shipped against the customer's order to prevent shipment of unordered items.

The female "checkers" were paid at rates below those paid to the male "checkers,"[13] yet, they were found to have performed work "requiring substantially equal skill, effort and responsibility." [App. 215.]

Behrens raises several objections to the district court's holding with respect to "checkers." First, it challenges the

[13]Plaintiff's Exhibit No. 6—Schedule P-10, App. pp. 170-171, documents this wage discrepancy.

ruling that Mrs. Newland, while checking in the middle aisle, performed work equal to that of Horton who checked at the end of the aisle. Behrens claims that the end of the aisle checker was responsible for checking narcotics, an obligation not imposed upon the middle of the aisle checker and purportedly requiring sufficient extra responsibility and effort to render the positions unequal under the Act.

Although checking narcotics certainly entails increased responsibility, the mechanical aspects of the task merely require preparation of a few extra forms. [App. 301.] The developing law of remunerative equality has increasingly been viewed as a question of fact to be determined on a case by case basis. See *Hodgson v. Golden Isles Nursing Home, supra,* and *Hodgson v. Brookhaven General Hospital, supra.* Evidence clearly exists to support the district court's finding that Mrs. Newland and Horton performed equal work. In fact, the pay schedule reveals that Mrs. Newland's salary was not immediately increased when she became close-out checker, suggesting that the narcotics handling aspect of that job was not by itself determinative of higher pay.

Second, appellant argues that no male worked as a close-out checker between February 2, 1970 and June 19, 1970 when Mrs. Newland performed that task. Horton, Mrs. Newland's predecessor at the close-out point, received $1.65 an hour, the same wage Mrs. Newland received after February 2, 1970. Thus, no equal pay violation occurred as between Horton and Mrs. Newland for that period.

The district court found, however, that another male employee, Mark Meadows, performed work equal to that of a

checker at a higher pay than Mrs. Newland during the February to June period. Meadows was officially designated a shelver, but job content, not job description is the critical issue. *Hodgson v. Brookhaven General Hospital, supra.* This contention of unequal work, like Behrens' first argument, is basically a disagreement over the court's factual determination. Ample facts support the district court's finding and that finding is not clearly erroneous. Rule 52, F.R.Civ.P.

Ruth Taylor was found to be due $558.94 in back wages for the period from December 21, 1968 to November 16, 1971. She worked as order filler prior to November 1, 1970, and from that date to November 16, 1971 she worked as close-out checker. The parties agree that her compensation as close-out checker was not in violation of the Act's equal pay provisons. Accordingly, the amount of restitution awarded her by the district court should be reduced by the amount which was computed to have accrued from November 1, 1970 to November 16, 1971. (Behrens' Brief, p. 45; the Secretary's Brief, p. 31 n. 14.) The district court's judgment should be modified by so reducing the judgment in favor of Ruth Taylor. In all other aspects the judgment is affirmed.

MODIFIED AND AFFIRMED.

United States Court of Appeals
FOR THE FIFTH CIRCUIT

October Term, 1972

No. 72-1680

D. C. Docket No. CA 5238

JAMES D. HODGSON, Secretary of Labor,
U. S. DEPARTMENT OF LABOR,
Plaintiff-Appellee,

versus

THE BEHRENS DRUG COMPANY,
Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Texas
Before RIVES, THORNBERRY and GOLDBERG,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Texas, and was argued by counsel:

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, modified as to Ruth Taylor and affirmed in all other aspects;

It is further ordered that defendant-appellant pay to plaintiff-appellee the costs on appeal to be taxed by the Clerk of this Court.

February 12, 1973

Issued as Mandate: March 8, 1973

CERTIFICATE OF SERVICE

It is hereby certified that three copies of this Appendix have been served upon the following persons by placing the same in a United States Post Box, properly addressed and first class postage prepaid, on this the 18th day of May, 1973: The Hon. Erwin N. Griswold, Solicitor General of the United States, Main Justice Bldg., 10th & Constitution Ave., N.W., Washington, D.C.; The Hon. Richard F. Schubert, Solicitor of Labor, The Hon. Carin Ann Clauss, Associate Solicitor of Labor, The Hon. Donald S. Shire, and The Hon. Anastasia T. Dunau, Attorneys at Law, United States Department of Labor, Main Labor Bldg., 14th and Constitution Avenue, Washington, D.C.; The Hon. George T. Avery, Regional Solicitor, and The Hon. Truett Bean, Deputy Regional Solicitor, United States Department of Labor, Federal Bldg. and United States Court House, Room 7C52, Dallas, Texas.

Mike A. Hatchell

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1505

THE BEHRENS DRUG COMPANY, PETITIONER

v.

PETER J. BRENNAN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-20)[1] is reported at 475 F. 2d 1041. The findings of fact and conclusions of law of the district court (A. 204-226) are not officially reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 21) was entered on February 12, 1973. The petition for a writ of certiorari was filed on May 8, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1]"Pet. App." references are to the separate appendix which accompanied the petition for a writ of certiorari. "A." references are to the appendix in the court of appeals, which has been lodged with the Clerk.

QUESTION PRESENTED

Whether the courts below correctly found that petitioner's training program, in which no woman had ever participated and which had no definite termination point, was not a bona fide "factor other than sex" within the exception provided in Section 6(d)(1)(iv) of the Fair Labor Standards Act's equal pay provisions and thus did not justify petitioner's practice of paying men more than women for the same work.

STATUTE INVOLVED

The equal pay provisions of the Fair Labor Standards Act of 1938, 52 Stat. 1060 *et seq.*, as amended, 29 U.S.C. 201 *et seq.*, and the pertinent provisions of the Secretary's interpretative bulletin, 29 C.F.R. 800, are set forth in the petition for a writ of certiorari (pp. 3-4).

STATEMENT

The Secretary of Labor brought this action under Section 17 of the Fair Labor Standards Act (29 U.S.C. 217)[2] to enjoin petitioner from continuing to violate the Act's equal pay provisions by paying male order fillers, city order desk clerks, and checkers and the male supervisor of its IBM data processing department wages at rates higher than those paid to women holding the same positions and performing the same duties as the men. The Secretary also sought to restrain the withholding of back wages due to the women employees as a result of the violations.

Petitioner—a drug wholesaler with annual sales in excess of $1,000,000 (Pet. App. 12, n. 8)—claimed that the

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[2]The petition erroneously states that the action was filed under Section 16(c) of the Act (Pet. 5).

work of the men and women checkers and of the male supervisor of the IBM data processing department and his female successor was unequal and thus justified a disparity in wages. Petitioner also claimed that its payment of disparate wages to the male and female order fillers and city order desk clerks was justified because the men, but not the women, were in a training program to become outside salesmen. Petitioner claimed that this program was bona fide under 29 C.F.R. 800.148 and thus within the "factor other than sex" exception in Section 6(d)(1)(iv) of the Act's equal pay provisions. The district court found that all the employees in question did perform equal work and rejected the "factor other than sex" defense. Accordingly, it granted the relief sought by the Secretary. Its decision was upheld in all respects by the court of appeals.

The petition for a writ of certiorari seeks review only of that part of the decision below concerning petitioner's "factor other than sex" defense. The district court rejected the "training program" as a basis for wage differentials, finding that petitioner "did not have any written or formal plan of training"; that the "so-called trainees received no formal course of instruction," but "worked along side-by-side with the female employees" who received lower pay; that the length of time spent in the training course was "dependent entirely upon whether and when the company needed or desired to employ [the male employee as] an additional outside salesman"; that "[m]any of the young men worked only a few months and became discouraged and quit"; and that others "worked many months, some for years, and were never promoted to the position of outside salesman" (A. 219); and, finally, that petitioner had never included women in its attempts to

recruit sales trainees or offered an outside selling job to a woman and had no intention of doing so (A. 220).[3]

The court of appeals agreed, pointing out that petitioner's training program "suffers from two principal weaknesses" (Pet. App. 8): (1) its "termination point is subject to the vagaries of the business climate and the company's personnel needs" (*ibid.*); and (2) it is "male dominated" (Pet. App. 9). In holding that petitioner's training program was not a bona fide training program which constituted a "factor other than sex" justifying a pay differential, the court also cited the testimony of petitioner's president "that women are not solicited as sales trainees because 'females were never considered as suitable for traveling'" as "a clear example of the attitude of male suitability designed to be nullified by the Equal Pay Act" (Pet. App. 10).

ARGUMENT

In its holding that a male-dominated training program of indefinite duration does not qualify for the

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[3]Petitioner's statement that it had offered a trainee position to a woman (Pet. 23-24) is contrary to the trial court's findings on the point (A. 220) and to the testimony of petitioner's president that women have never been included in the training program (A. 528, 554-555) because they "were never considered as suitable for traveling" (A. 546). In now stating otherwise, petitioner relies on the fact that it asked one woman, not in the training program, to fill in temporarily for an outside salesman while he underwent surgery (A. 441). The woman declined the offer because it involved a temporary assignment (A. 448-449) with no increase in pay (A. 444-445). The petition also states that "[p]articipants in the program are required to conform to a uniform educational background (A. 815)" (Pet. 9). That "uniform educational background" consists of a high school education (A. 815) an attainment which all of the female employee witnesses possessed (A. 269-270, 450).

"factor other than sex" exception provided in Section 6(d)(1)(iv) of the Act, the decision below is in accord with the other court of appeals' decisions which have considered the issue. See *Hodgson* v. *Fairmont Supply Co.*, 454 F. 2d 490 (C.A. 4); *Hodgson* v. *Security National Bank of Sioux City*, 460 F. 2d 57 (C.A. 8); *Shultz* v. *First Victoria National Bank*, 420 F. 2d 648 (C.A. 5). In all of these cases, the courts examined the training programs offered in justification of the higher male rates and, upon finding that they rested on "unfair" and "outmoded" conceptions regarding the value of women's work (*Security National Bank, supra*, 460 F. 2d at 63), held that "We cannot accept a training program co-terminous with a stereotyped province called 'man's work' as a factor other than sex" (*Fairmont Supply, supra*, 454 F. 2d at 498). Thus, such training programs, which consist "of little more than recognition of the ability of employees to work their way up the ranks" (*First Victoria, supra*, 420 F. 2d at 654; *Security National Bank, supra*, 460 F. 2d at 62; and *Fairmont Supply, supra*, 454 F. 2d at 498), are not within the statutory exception because they are based on sex, rather than on a bona fide "factor other than sex."

Here, the court of appeals carefully examined petitioner's training program and found that, although it was neither "illusory" nor "a mere post-event justification for disparate wage payments," the fact remained that women were not included in it "because 'females were never considered as suitable for traveling'" (Pet.

App. 10).[4] This, coupled with the fact that advancement to a sales job depended entirely upon personnel needs, "compel[s] the conclusion that Behrens' training procedure is not a factor other than sex which should excuse denial of equal pay to female workers and remove them from the aegis of the Equal Pay Act" (*ibid.*). This holding, like the other court of appeals decisions (*supra*) involving similarly unstructured and male-oriented training programs, correctly applies the long standing principle that exemptions from the Fair Labor Standards Act "must therefore be narrowly construed" and applied only to those "plainly and unmistakably within [their] terms and spirit" (*Phillips, Inc.* v. *Walling*, 324 U.S. 490, 493; *Arnold* v. *Ben Kanowsky, Inc.*, 361 U.S. 388, 392).[5]

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[4]Petitioner's attempt to justify the exclusion of women from its training program on the basis of state laws and traveling conditions as they existed in 1946 (Pet. 12, fn.) merely confirms the fact that it had its origin in sex. Moreover, the Equal Pay Act was not enacted until 1963, and petitioner had a period of one year thereafter within which to bring about compliance, either by opening up its training program to women or by raising their rates of pay to those of the male "trainees." It did neither.

[5]Petitioner's argument that neither the decided cases nor 29 C.F.R. 800.148 provide "much help" as to what constitutes a "bona fide training program" and that it should not be "penalized" now for its good faith effort to "formulate" a training program under the Secretary's "nebulous guidelines" (Pet. 15), is answered by the fact that petitioner's training program was formulated in 1946 and not revised with the advent of the Equal Pay Act in 1963 (see n. 4, *supra*). Moreover, the decisions cited above give considerable illumination to the requirement of the Act. In any event, as the Court stated in *Overnight Motor Transportation Co.* v. *Missel*, 316 U.S. 572, 583 (footnote omitted), any such "difficulty does not warrant shifting the burden to the [women] employee[s]. [Equal] wages were specified for [them] by the statute, and [they were] no more at fault than the employer."

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1973.

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